

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 154,733

ON the 24th day of March, 1994, the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Alvin E. Witwer, dated February 15, 1994, came on for oral argument.

Claimant appeared by and through his attorney Daniel L. Smith of Overland Park, Kansas. Respondent and insurance carrier appeared by and through their attorney Gregory Worth of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Tony Romano of Kansas City, Missouri. There were no other appearances.

The record considered by the Appeals Board is the same as that specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are the same as those specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge found that claimant had experienced an aggravation of a pre-existing condition that entitled him to permanent partial disability benefits based upon a thirty percent (30%) impairment of function rating, and pursuant to stipulation found the Kansas Workers Compensation Fund responsible for eighty percent (80%) of the costs and benefits associated with the Award. The Kansas Workers Compensation Fund has requested the Appeals Board to review the Administrative Law Judge's decision. The respondent and Kansas Workers Compensation Fund contend on review that claimant has failed to establish his entitlement to benefits. The claimant contends that he is entitled to permanent total disability benefits.

The issues before the Appeals Board are:

- (1) Whether claimant has established accidental injury arising out of and in the course of his employment from December 1990 through April 8, 1991.
- (2) Whether claimant is entitled to permanent partial or permanent total disability compensation.
- (3) Whether claimant is entitled to future medical care and treatment.

Notice and prejudice were issues before the Administrative Law Judge. However, the parties stipulated at oral argument that they were not issues for this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

- (1) Claimant met with personal injury by accident arising out of and in the course of his employment with the respondent while performing his job duties during the period of December 1990 through April 8, 1991.

After undergoing back surgery in September 1990, claimant returned to work for the respondent in late October 1990 without work restrictions and limitations. Claimant initially returned to his duties as a quality control inspector, but due to a reduction-in-force situation he was transferred to a physical labor position in the respondent's air brake division. While working in the air brake shop, claimant regularly lifted up to sixty-five to seventy (65-70) pounds and frequently bent and twisted at the waist. As a result of these work duties, claimant experienced increased back pain. On April 8, 1991, claimant lifted a tub of parts while at work and experienced a stabbing pain in his low back. Claimant reported the incident and sought additional treatment from Mark Bernhardt, M.D., the physician who previously operated on him. The claimant has proved by a preponderance of credible evidence that he sustained personal injury by accident during the period that he worked in the air brake shop from December 1990 through April 8, 1991. As April 8, 1991, is the date that claimant experienced increased symptomatology when he lifted the tub of parts and left work to never return, the Appeals Board finds that date should be used to compute permanent partial disability benefits.

(2) The claimant is entitled to permanent partial general disability benefits based upon the thirty percent (30%) permanent partial impairment of function rating provided by Dr. Mark Bernhardt.

The evidence is overwhelming that claimant's physical condition is worse and that claimant's physical abilities significantly decreased as a result of the injury he experienced in the air brake shop. Assuming that claimant will not pursue the back surgery now recommended by Dr. Bernhardt, claimant has experienced a thirty percent (30%) permanent impairment of function to the body as a whole. Dr. Bernhardt believes that claimant should limit his work activities to the sedentary work category defined by the *Dictionary of Occupation Titles* published by the United States Department of Labor. Also, Dr. Bernhardt believes that claimant should restrict himself to jobs that allow him to change positions frequently and refrain from all repetitive bending, lifting or twisting movements. Essentially, claimant should perform no manual labor and should lift no more than ten (10) pounds.

The respondent and Kansas Workers Compensation Fund argue that claimant should receive no permanent partial or permanent total disability benefits in this instance as the claimant failed to establish that his impairment of function rating increased over what it was as a result of the back surgery and spinal fusion in September 1990. Although claimant's impairment of function rating may not have changed, his physical condition and symptomatology did. Dr. Bernhardt states that claimant's low back condition was aggravated and made more symptomatic because of the heavier work that he was required to do after the reduction in force caused him to lose his position as a supervisor. Dr. Bernhardt also believes that the aggravation and increased symptomatology is in part responsible for claimant's present need for additional spinal surgery.

It is well settled that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or condition, or intensifies the affliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984); Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 49, 611 P.2d 180, rev. denied 228 Kan. 806 (1980).

In Brozek v. Lincoln County Highway Dept., 10 Kan. App 2d 319, 698 P.2d 392 (1985), the Court of Appeals of Kansas held that claimant had experienced an injury compensable under workers compensation and was entitled to permanent partial disability benefits despite the fact that claimant's functional impairment rating did not increase. In Brozek, as in the proceeding now before us, claimant's symptomatology increased as a result of the work-related injury in issue and claimant's ability to work decreased.

Claimant contends that he is entitled to permanent total disability benefits. The Appeals Board does not agree. At the time of the regular hearing, claimant was twenty-nine (29) years old and had completed the tenth (10th) grade. Claimant has not worked since leaving respondent on April 8, 1991, but he has not sought employment. Claimant has not presented evidence from any expert regarding the effect of claimant's injuries upon his ability to perform work in the open labor market and to earn comparable wages to what he was earning when injured in the brake shop. On the other hand, claimant's physician believes that claimant is capable of performing work of a sedentary nature.

Claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 1992 Supp. 44-510e(a):

“ . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . .”

The Appeals Board is without evidence to determine the extent to which claimant's ability to earn a comparable wage or ability to perform work in the open labor market has been affected by this injury. As the evidence fails to establish that claimant has experienced permanent partial general disability greater than the functional impairment rating of thirty percent (30%), claimant is entitled to permanent partial general disability benefits based upon that rating.

(3) Claimant may be in need of future medical treatment for this low back injury. Dr. Bernhardt feels that additional surgery is appropriate at this time. Future medical treatment is to be under the direction of such orthopedic surgeon or other healthcare professional as the respondent's insurance carrier shall select.

(4) The Appeals Board adopts the findings and conclusions of Administrative Law Judge Alvin E. Witwer as set forth in his Award of February 15, 1994.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated February 15, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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